Supreme Court, U.S.
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No. 01-248

IN THE

# Supreme Court of the United States

ULSTER HOME CARE INC., *et al.*,

*Petitioners,*

-and-

DANIEL RUBIN,

*Petitioner,*

*v.*

ELIOT SPITZER,
as Attorney General of the State of New York,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

## REPLY BRIEF

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## STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page ii of their Opening Brief, and there are no amendments to that Statement.

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## INTRODUCTION

Petitioners respectfully submit this Reply in response to the jurisdictional issue raised by Respondent at point I of his Brief in Opposition. The twin decisions involved herein are "final judgments" within the meaning of 28 U.S.C. § 1257. Respondent's argument cuts to the heart of the constitutional issue raised by this Joint Petition. The ability to immediately attack a "facially" defective law is critical to our American system of civil liberties. If vague laws which are used for criminal enforcement purposes are unreviewable under Section 1257 unless they are first decided "as applied" to the facts of a particular criminal matter, defendants in criminal cases and those who are subject to a prosecutor's threats of prosecution must suffer the very deprivation of liberty which the "facial" analysis is designed to overcome.

Because New York's high court has historically and uniformly required an "as applied" analysis in vagueness challenges and because such a process inevitably involves an *ad hoc* application of the laws being attacked as lacking enforcement guidelines, this case merits review before significant and fundamental liberty rights are trammeled. The insidious nature of such deprivations have forced those under the Attorney General's scrutiny to either settle by paying large sums of money or plea bargain their rights rather than face a criminal trial to assert the "as applied" defense.

This Court has set forth four exceptions to the finality rule with respect to State court decisions. (*Cox Broadcasting Corporation v. Cohn*, 420 U.S. 478 (1975).) Petitioners fall within the first and fourth exceptions therein.

## I.

## THE FINAL JUDGMENT RULE DOES NOT PRECLUDE JURISDICTION OF THE FACIAL INVALIDITY OF THE "PUBLIC CHARGE" REGULATION.

As noted in *Cox Broadcasting*, the first exception involves situations where there are "further proceedings — even entire trials — yet to occur in the state courts" yet "the federal issue is

conclusive *or* the outcome of further proceedings preordained". (*Ibid.* 420 U.S. at 479, emphasis supplied.)

Both the decisions in *Ulster* and *Rubin* represent the final judgment of the New York Court of Appeals as it involves the "facial" invalidity of enforcing the "public charge" regulation. Nothing will change the high court's ruling as a result of any of the proceedings currently underway in the remittal of *Ulster*'s case or *Rubin*'s remand.[1] There is no question that as to the use of the "public charge" regulation to prosecute home care agencies, the high court's decisions are "final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein". (*Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997).) Under such circumstances, the New York high court "has finally adjudicated the constitutionality" of the regulation at issue. (*Duquesne Light Co. v. Barasch*, 488 U.S. 304, 308 (1989).) Respondent's Brief in Opposition fails to explain how any of the remaining proceedings in *Ulster* or *Rubin* will change in any way the Court of Appeals' ruling.

Mr. Rubin is presently serving his prison term in a correctional facility. The basis for remand in his case does not involve any re-examination of the facial validity of the "public charge" regulation. Rather, the remand involves prosecutorial excesses at trial and sufficiency of the evidence, *inter alia.* A most significant issue, for example, involves the fact that the prosecution represented to the jury that Mr. Rubin had filed statements asserting compliance with "all applicable rules and regulations" when in fact the certifications did not contain such language for some of the earlier periods charged in the indictments. In a decision rendered after this Joint Petition was

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1. In *Ulster*, after reversing the grant of summary judgment, the Court of Appeals remitted the case to the trial court for further proceedings not inconsistent with the court's ruling. Shortly thereafter, the Attorney General moved to vacate the preliminary injunction in the case. The decision on remand in the *Rubin* case and the decision vacating *Ulster*'s preliminary injunction (as well as those staying such decision on appeal) are included in a supplemental appendix annexed hereto.

filed, the Appellate Division rejected such arguments, noting that the jury had sufficient evidence and that by making certifications of compliance with all applicable regulations, "defendant implicitly was certifying that the rates charged to the general public were the same or greater than the rate sought in the certifications for reimbursement when they were not." (286 A.D.2d 555, 729 N.Y.S.2d 561 (Aug. 30, 2001) (Appendix, 3a hereto.) Significantly, the Appellate Division also affirmed Mr. Rubin's criminal sentence.

With respect to Ulster Home Care, the remittal allowed the Attorney General to seek vacatur of the preliminary injunction so that he would be free to fully prosecute this non-profit agency. As noted by the Respondent's Brief in Opposition, "before there can even be a trial", the prosecution intends to seek either a new indictment or reinstatement of the indictments which he previously obtained in contempt of court. (Respondent's Brief at page 8.) Such a result would then leave to the jury the important policy questions of defining who are Ulster's members of the "general public" and what level of "charges" are appropriate. As noted by the *Amicus Curiae*, such questions are usually resolved by regulation or legislative intent, not be a free-for-all attempt to convince jurors of each respective side's interpretation *in a criminal trial*. (*See* Brief of *Amicus Curiae* at page 15.) Accordingly, to subject Ulster Home Care (as well as all other providers who have different types of "charges" and "general public" customers) to such an *ad hoc* process represents the very deprivation which is triggered by the Court of Appeals' disposition. Such a disposition should be considered "final" for purposes of Supreme Court review. (*See National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977); *Nebraska Press Association v. Stuart*, 423 U.S. 1327 (1975).) Petitioners herein claim the right not to be prosecuted except by reference to clearly defined laws, the "legal and practical value of which would be destroyed if it were not vindicated before trial". (*See United States v. MacDonald*, 435 U.S. 850, 860 (1978).)

## II.

## IMPORTANT FEDERAL POLICY WARRANTS REVIEW OF THE FEDERAL QUESTION DESPITE SUBSEQUENT PROCEEDINGS IN STATE COURT.

This Court retains jurisdiction under 28 U.S.C. § 1257 where a

> federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review . . . might prevail on the merits on non federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . .

*Florida v. Thomas*, 532 U.S. 774, 121 S. Ct. 1905, 1906 (June 4, 2001), quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).) This limitation represents the fourth exception to the finality doctrine identified in *Cox Broadcasting*. Both *Ulster* and *Rubin* fall within this very limited exception allowing review where important Federal questions are raised in light of the strong policy considerations at stake with respect to the correct standard of review for facial invalidity of vague laws.

### A. Importance of the Federal policy prohibiting criminal enforcement of undefined laws.

In order to fall within the fourth exception set forth in *Cox Broadcasting*, the underlying decision must involve an important "federal policy". In this case, where vague laws are enforced criminally the appropriate rule of finality should be similar to that which is applied to appeals involving First Amendment rights. (*See Fort Wayne Books v. Indiana*, 489 U.S. 52, 55 (1989) ("Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule".)

As noted in the Petition, this Court's holding in *City of Chicago v. Morales*, 527 U.S. 41 (1999), would strongly suggest that courts throughout the Nation should apply a more stringent level of "facial" review in criminal vagueness challenges. Without such level of scrutiny, arguments as to whether a law sets forth sufficient definitions and guidelines will be given short shrift despite deficiencies in the law itself. In the mania which is sometimes created to fight health care fraud, this type of treatment is not uncommon once the momentum of an indictment is triggered. Yet, the individual liberty rights of those unfortunate enough to be targets should be given considerable weight where a law has absolutely no promulgated definitions nor has developed any well-defined usage.

Here, the Court of Appeals summarily reversed a well reasoned appellate court decision without explaining in any way why an undefined "public charge" regulation could be used criminally. The Court of Appeals merely iterated a conclusion: "Neither the term "general public" nor "rate" as used in the regulation is so vague that it could not be understood by a person of ordinary intelligence *or could be arbitrarily enforced*." (*Ulster*, 96 N.Y.2d 505, __N.E.2d __ (May 10, 2001).) The court then simply referred to a number of other regulations, from payments made by the Veterans Administration to taxi services for vocational services in New York, which contain similar but not identical language.[2] The danger in this line of reasoning is that for every regulation cited by the court showing that these words were used in other contexts, there are just as many regulations showing that such separate programs are uniquely tailored to their own situations and that the regulators define such terms to fit their own policy needs.[3]

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2. None of these regulations cited have anything to do with home care services in New York. Research has failed to disclose any case law interpreting such provisions nor is there any evidence that they were ever enforced.

3. California's Attorney General pursued an almost identical (Cont'd)

Far from following the plurality's views in *Morales* regarding the facial review of undefined laws, the New York Court of Appeals has consistently required that the party challenging a provision as vague be required to show such vagueness "as applied" to him or her. Although the Attorney General asserts that the Court of Appeals has correctly applied the facial analysis set forth in Petitioner's Brief, in fact, the only "facial" review undertaken by the Court of Appeals was to question whether a party could reasonably understand what "charges" and "general public" mean. However, this completely misses the point of *Morales*. The proper inquiry is whether "charges" and "general public" can be understood to so mean so many different things that the law's application becomes whimsical without published guidelines and definitions.

Our system of justice should allow for the substantive review of such undefined laws. The preservation of being a Nation of well-defined laws and not one which allows policy making through criminal enforcement is an important Federal policy. As such, the same level of review afforded to the

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(Cont'd)
case against laboratories in that State. This enforcement campaign was rejected by California's appellate courts:

> In our view, the practice of negotiating discounts for physicians' private-pay patients benefits health care consumers. *** [A]ppellant argues that the practice is unfair to the public because Medi-Cal is not offered similar discounts. This argument, which seems to be at the heart of appellant's case, is wrong. The amount Medi-Cal pays for a test is governed by regulations promulgated by the Department. Under those regulations, Medi-Cal will pay no more than the lesser of the amount billed, the charge to the general public, Medicare's allowance, or scheduled amounts. . . . Medi-Cal, not Duz-Mor, controls the amount Medi-Cal pays.

*People v. Duz-Mor Diagnostic Laboratory, Inc.*, 68 Cal. App. 4th 654, 663, 80 Cal. Rptr. 2d 419, 425-426 (1999).

preservation of Free Speech rights should be afforded to this first essential of Due Process. Civil liberty is too important a concept in our society to be replaced by a judicial deference allowing prosecutors to formulate the law. It is clear that the New York high court has ignored the main thrust of this Court's *Morales* decision.[4] It is not enough to reject a facial attack on the basis that a particular provision may be reasonably understood by an ordinary citizen. If such a provision may be understood ten different ways by ten different people, it leaves enforcement to the whims of a particular prosecutor's interpretation.

The importance of Federal policy in this area spreads beyond Petitioners herein. As noted by *Amicus Curiae*, the field wide is open for prosecutors to make policy. It is insufficient to say that a party's rights will be protected by the jury when that jury will define the very laws set forth in an indictment. This flexibility on the part of a prosecution is critically coercive in that an accused must literally gamble that the jury will see the law as the accused has interpreted it, as opposed to how the prosecution is defining the terms.[5]

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4. The Court of Appeals has uniformly and routinely held that "challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand". (*State of New York v. Rutkowski*, 44 N.Y.2d 989, 991, 380 N.E.2d 166, 167, 408 N.Y.S.2d 335, 336 (1978).) This holding has been consistently applied by the high court in criminal cases through to the instant applications. As stated by the high court, under this standard, "the courts should not have relied on hypotheses in determining whether the statutes were unconstitutionally vague." (*Ibid.*)

5. On the one hand "charges to the general public" may be reasonably interpreted as the prices used for all clients receiving services from the provider. This would likely exonerate Ulster Home Care. Yet, the Attorney General has interpreted "charges" as being the discounted amounts paid by "self-paying" or uninsured patients for no-frills services. The uninsured constitutes a very small segment of the

(Cont'd)

The court below failed to analyze the significance of the lack of definitions and guidelines given the fact that technical terms were being used by the prosecution in a manner which was inconsistent with policy across the Nation. Instead, the court only reviewed whether the law was so vague that the accused could not reasonably understand that their conduct would fall within its scope. This is fine when one is dealing with words which have common meanings in our culture such as jostling (*See People v. Nelson*, 69 N.Y.2d 302, 514 N.Y.S.2d 197, 506 N.E.2d 907.) However, when the face of the law allows a prosecutor to interpret the term "general public" to mean only "private" or "self-pay" patients *and no other*, there should be serious concern on the part of the courts. Combined with the high court's refusal to provide a limiting construction, a prosecutor's accusation that a provider has lied about regulatory compliance by "implicit certifications" (Appendix "A" hereto) allows the public charge regulation to be a "catchall enactment left at large by the State court which applied it." (*See Beauharnais v. People*, 72 S. Ct. 725, 729 (1952).)

Imbedded within the *Cox Broadcasting* decision itself is the concept that "finality" does not require exhaustion of state remedies when "the subsequent state proceedings would themselves deny the federal right for the vindication of which review is sought in the Supreme Court". (Stern, et al., Supreme Court Practice at p. 104, (7th Ed., © 1993).)

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(Cont'd)

"general public" served by most home care providers. (*See Amicus Curiae* brief at page 4.) A person who is liable to spend 14 years in jail should not have to roll the dice of a jury trial to see whose interpretation the jury will find more appropriate under such circumstances. Indeed, this concept is utterly repugnant to our American system of justice.

**B. Subsequent State Court Proceedings May Preclude this Court's review of the important Federal questions involved herein.**

The second requirement under the fourth exception set forth in *Cox Broadcasting* is that the Petitioners may prevail on state law claims in a manner which may later preclude federal review of the constitutional issue. In this respect, both *Ulster* and *Rubin* involve separate state-law claims which may provide full relief and thus preclude subsequent Federal review. Conversely, review of the facial validity of the "public charge" regulation would terminate the litigation in both cases if the regulation is found to be facially invalid.

As noted in Point I above, the remaining issues in the *Rubin* proceedings involve the sufficiency of evidence supporting his conviction and the use of certifications which did not contain the relevant language as to compliance with "all applicable" regulations, among other things. The Attorney General has noted that there is an outstanding application for leave to appeal to the Court of Appeals on these counts. Although the facial validity of the "public change regulation" will not be re-considered as part of this appeal, there could be a reversal on the basis of the state-law claims.

Similarly, *Ulster* involved a separate state-law basis for declaratory and injunctive relief. In particular, Ulster Home Care had entered into a contract for the provision of Medicaid services which covered the period 1994 and forward. This contract specified that Ulster Home Care was to be paid at a cost based rate and that such payments could not be retroactively reduced. As noted by the Appellate Court, in addition to facially attacking the "public charge" regulation, "Ulster Home moved for summary judgment seeking a declaration that defendant's threatened prosecution violates the contracts between itself and Ulster County". (*Ulster*, 268 A.D.2d 59, at 61, 706 N.Y.S.2d 739 (2000). This aspect of the declaratory judgment action has never been decided due to the Appellate Court's declaration invalidating the "public charge" regulation. However, it is now

the subject of Ulster Home Care's pending appeal as to why the preliminary injunction should stay in place pending a determination by the trial court on all open issues.

In a case very similar to the instant matter, a Federal Circuit Court of Appeals rejected a false claims prosecution as a matter of law regardless of *scienter* issues. (*United States v. Race*, 632 F.2d 1114 at 1120 (4th Cir. 1980).) ("one cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract").) Similarly, Ulster Home Care may ultimately prevail on this state-law issue as part of its claim that the Attorney General should not be allowed to rewrite Ulster's Medicaid contract in a manner which, if done in a civil setting, would amount to a breach thereof. The Attorney General seeks to replace the cost-based payments made to Ulster Home Care as part of this contract with the Attorney General's understanding of the "public charge".

## CONCLUSION

For the foregoing reasons, petitioners respectfully request that the petition be granted.

Respectfully submitted,

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